

REMARKS

This responds to the Final Office Action dated January 7, 2011. In the Office Action the Examiner:

- Rejected claims 1-27 under 35 U.S.C. § 103(a) as being unpatentable over Nahan et al. (US 5,664,111) in view of Stack (US 6,076,070) and Reuhl et al. (US 5,873,069) and Woolston (US 6,202,051 B1).

The pending claims are: claims 1-27.

Changes to the Claims

Claims 2, 18, and 25 have been amended to correct antecedent basis. No new matter has been added.

35 U.S.C. §103(a)

Claims 1-27

As a preliminary matter, it is well known that the Examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. “All words in a claim must be considered in judging the patentability of that claim against the prior art.” MPEP § 2413.03 citing *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). Thus, “obviousness requires a suggestion of all limitations in a claim.” *CFMT, Inc. v. Yieldup Intern. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)). Moreover, as the Supreme Court stated, “there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Claim 1 requires “receiving data from an independent seller..., the data identifying a good offered for sale by the independent seller and representing the independent seller’s agreement to sell the good at an unspecified fixed price to be determined by the marketeer

controller as a function of another party's price for a comparable good, in accordance with a predetermined method". Thus, the data received from the seller includes an agreement by the seller to sell a good at an unspecified fixed price that is determined by the marketeer controller based on a vendor's price of a comparable good. For example, the seller may provide a UPC code that identifies the good without specifying the price of the good. The marketeer system then obtains a vendor's price of a comparable good and establishes the sale price for the good based on the vendor's price of the comparable good, as required by claim 1. It is noted that prior to obtaining the vendor's price of the comparable good, the seller's good is not associated with a price.

Nahan does not disclose receiving data from the independent seller representing the independent seller's agreement to sell the good at an unspecified fixed price to be determined by the marketeer controller as a function of another party's price for a comparable good, as required by claim 1. The Examiner cites various sections of Nahan, but the only cited section of Nahan that discusses pricing of goods merely discloses calculating a price difference ratio based on a retail price for the good and a wholesale price for the good (e.g., see Nahan column 13, lines 13-28). This section of Nahan does not disclose who specifies the retail and wholesale prices and in what manner the retail and wholesale prices are specified. Therefore, Nahan cannot disclose receiving data from the independent seller representing the independent seller's agreement to sell the good at an unspecified fixed price to be determined by the marketeer controller as a function of another party's price for a comparable good.

Stack and Reuhl also fail to address the deficiencies of Nahan with respect to claim 1. For example, the Examiner cites Stack column 2, lines 34-60 and column 3, line 45 to column 4, line 15, and column 4, lines 31-33,¹ which merely disclose comparing a seller's price of a good with a competitor's price of the good and situations in which a price of a good is reduced. The Applicant notes that in order to compare a seller's price of a good with a competitor's price of the good, the seller's good must necessarily be associated with a price. Furthermore, to reduce a price of a seller's good, the seller's good must necessarily be associated with a price. In other words, the price of the good has already been specified and Stack is merely comparing a

¹ Page 5 of the Office Action dated January 7, 2011.

competitor's price and reducing the seller's price of the good. There is nothing in these sections of Stack that disclose that the marketeer system receives data representing the independent seller's agreement to sell the good at an unspecified fixed price to be determined by the marketeer controller as a function of another party's price for a comparable good, as required by claim 1. Similarly, the Examiner cites Reuhl column 4, lines 7-19, which merely discloses comparing an active price of the seller's good with a competitor's price of the good and changing the price of the seller's good accordingly.² As with Stack, this section of Reuhl necessarily requires that the good is already associated with a price. There is nothing in this section of Reuhl that discloses that the marketeer system receives data representing the independent seller's agreement to sell the good at an unspecified fixed price to be determined by the marketeer controller as a function of another party's price for a comparable good, as required by claim 1.

The Examiner then states that Woolston's Abstract discloses an unspecified fixed price.³ However, Woolston's Abstract merely discloses an auction. The Applicant points out that although the price of a good during an auction may change, this feature of an auction does not disclose "an unspecified fixed price". Specifically, the Applicant respectfully requests that the Examiner consider each word of the claim. The terms "an unspecified fixed price" mean that the price is both a fixed price (e.g., the price does not change once it is set) and the price is unspecified (e.g., unspecified by the seller at the time the data is received by the marketeer system). Although the price of a good in an auction may be unspecified (e.g., it may change over time), the price of the good in the auction is not fixed (e.g., the price of the good during the auction changes throughout the course of the auction), as required by claim 1. Thus, there is nothing in these sections of Woolston that disclose that the marketeer system receives data representing the independent seller's agreement to sell the good at an unspecified fixed price to be determined by the marketeer controller as a function of another party's price for a comparable good, as required by claim 1.

For at least the reasons noted above, Nahan, Stack, Reuhl, and Woolston either alone or in combination, do not disclose "receiving data from an independent seller..., the data

² Page 7 of the Office Action dated January 7, 2011.

³ Page 9 of the Office Action dated January 7, 2011.

identifying a good offered for sale by the independent seller and representing the independent seller's agreement to sell the good at an unspecified fixed price to be determined by the marketeer controller as a function of another party's price for a comparable good, in accordance with a predetermined method", as required by claim 1. Thus, claim 1 and its dependents are patentable over the combination of Nahan, Stack, Reuhl, and Woolston. Furthermore, claims 16, 18, 21, 25, and their dependents are patentable over the combination of Nahan, Stack, Reuhl, and Woolston for at least the reasons noted above with respect to claim 1.

In addition to the reasons noted above with respect to claim 1, claim 2 is patentable over the combination of Nahan, Stack, Reuhl, and Woolston for the following additional reasons.

Claim 2 requires "presenting the good in a marketplace as an item for sale at the unspecified fixed price..." For example, if a seller is selling a baseball card, the baseball card is presented in the marketplace at the unspecified price (e.g., a price for the baseball card is not specified).

The Examiner correctly states that Nahan, Stack, and Reuhl do not disclose this element of claim 2.⁴ The Examiner then states that Woolston's Abstract discloses this element of claim 2.⁵ However, Woolston's Abstract merely discloses an auction process. As discussed above, an auction does not involve pricing items at an unspecified fixed price. Thus, Woolston cannot disclose "presenting the good in a marketplace as an item for sale at the unspecified fixed price...", as required by claim 2.

Claim 2 also requires "presenting the good for sale in the marketplace at the sale price, the querying and establishing steps being performed responsive to receiving from the buyer ... an expression of interest in purchasing the good..." Thus, the sale price of the good is determined in response to a buyer expressing interest in purchasing the good. Continuing the example, when a buyer expresses an interest in purchasing the baseball card, the vendor

⁴ Pages 8-9 of the Office Action dated July 22, 2010.

⁵ Pages 8-9 of the Office Action dated July 22, 2010.

controller is queried and a sale price is established. The baseball card is presented in the marketplace at the sale price.

The Examiner correctly states that Nahan, Stack, and Reuhl do not disclose this element of claim 2.⁶ The Examiner then states that Woolston's Abstract discloses this element of claim 2.⁷ As discussed above, Woolston's Abstract merely discloses an auction process. An auction process does not disclose "querying a vendor to determine the vendor's price for a comparable good..." and "establishing with a pricing agent stored in the memory of the marketeer controller a sale price at which the good may be purchased by a buyer from the independent seller, the sale price derived by the predetermined method using as input the received vendor's price for the comparable good" in response to receiving from the buyer an expressing of interest in purchasing the good. In fact, in an auction, the sale price of the good is determined by the highest bid placed by buyers of the good and not by a vendor's price of a good.

Thus, Woolston does not disclose the required elements of claim 2. Since Woolston does not address the deficiencies of Nahan, Stack, and Reuhl, claim 2 is patentable over the combination of Nahan, Stack, Reuhl, and Woolston.

For at least the reasons noted above, the Applicant respectfully requests the withdrawal of the 35 U.S.C. §103(a) rejection of claims 1-27.

⁶ Pages 8-9 of the Office Action dated July 22, 2010.

⁷ Pages 8-9 of the Office Action dated July 22, 2010.

CONCLUSION

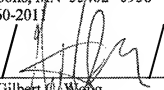
Applicants respectfully submit that the claims are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's representative at (408) 660-2011 to facilitate prosecution of this application.

If necessary, please charge any additional fees or deficiencies, or credit any overpayments to Deposit Account No. 19-0743.

Respectfully submitted,

SCHWEGMAN, LUNDBERG & WOESSNER, P.A.
P.O. Box 2938
Minneapolis, MN 55402--0938
(408) 660-2011

Date 3/7/2011

By 
Gilbert D. Wong
Reg. No. 57,990